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239-533—66

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 731

LOCAL UNION No. 542–A, –B, –C, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 27) is reported at 360 F. 2d 111. The findings of fact, conclusions of law, and order of the Board (J.A. 1a–14a)[1] are reported at 152 NLRB 553.

JURISDICTION

The decision of the court of appeals issued on May 9, 1966, and a decree was entered on June 2, 1966 (Pet. 27, 28). On August 12, 1966, Mr. Justice Bren-

[1] "J.A." refers to the Joint Appendix filed in the court of appeals.

nan extended the time for filing a petition for certiorari to and including October 30, 1966. The petition for certiorari was filed on October 29, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> SEC. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> * * * * *
>
> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: * * * *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of

such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

* * * * *

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board properly concluded that an object of the union's picketing was to force an employer to recognize or bargain with it within the meaning of Section 8(b)(7) of the Act.

2. Whether the Board properly concluded that the picketing was not "for the purpose of truthfully advising the public" within the meaning of the publicity proviso to Section 8(b)(7)(C).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Kaminski Construction Company (hereafter referred to as Construction) was incorporated in 1962, and engaged solely in highway construction until July 1963; since then it has performed no work and has had no employees (J.A. 4a; 20a, 22a–23a). In April 1962, Construction entered into an agreement with petitioner, Local 542 of the Operating Engineers, covering the working conditions of the operating engineers employed by Construction (J.A. 4a; 87a–94a). The agreement had an expiration date of December 31, 1963, with a provision for automatic renewal "from year to year unless notice to terminate or to effect a change in any Article is given in writing ninety (90) days prior to expiration" (J.A. 4a; 89a–90a). On September 12, 1963, petitioner wrote

to Construction stating that in accordance with the contract it was giving notice of its desire to meet with Construction "for the purpose of discussing the terms and conditions of a new agreement to replace the * * * agreement which expires on December 31, 1963" (J.A. 4a; 95a–96a). Construction did not reply and, in November 1963, instructed the Operating Engineers' welfare and pension fund to "discontinue mailing monthly reports because we are not active with the Engineers at the present time" (J.A. 4a–5a; 50a–53a). Petitioner had no further contact with Construction until March 1964.

Kaminski Brothers (hereafter referred to as Brothers) was incorporated in 1949 and has engaged continuously in the strip mining of coal; its employees engaged in this work have been represented continuously by District 1, United Mine Workers (J.A. 4a–5a; 20a, 23a–24a). Brothers and Construction are separate corporations, though they are commonly controlled, have the same officers, and share common offices (J.A. 4a, 9a; 20a). On January 24, 1964, Brothers extended its operations to highway construction, when it was awarded the prime contract for the construction of 4.6 miles of highway (J.A. 5a; 25a–26a). Brothers bid on the job because it owned most of the necessary equipment, and Construction was too small to bid or obtain sufficient bonding on a job of that size (J.A. 5a; 26a). Several days later, Alfred Cherney, a representative of District 50, United Mine Workers, approached Brothers' president, John Kaminski, and requested a contract covering highway workers on

the new job (J.A. 5a; 28a). On February 19, Kaminski authorized an employer group, the Pennsylvania Heavy & Highway Contractors Bargaining Committee, to deal with District 50 of the United Mine Workers on behalf of Brothers, and also agreed that Brothers would be bound by the current contract between the Committee and District 50 (J.A. 5a; 28a–29a, 76a–77a, 85a–86a).

On March 9, Brothers began work on the highway job, using employees that had been working in its strip mining operation (J.A. 6a; 27a).[2] Two days later, Frank Priscopo, a representative of petitioner, Local 542 of the Operating Engineers, demanded that Brothers sign a contract with Local 542 covering the highway work (J.A. 6a; 30a–31a). When Kaminski replied that Brothers had contracted with District 50, Priscopo asserted that he did not like Brothers' bidding on the highway job; that he did not know there was a Kaminski Brothers as well as a Kaminski Construction; and that, if he had known, "he would want all of the companies in the Engineers" and would not have "signed up" only one company (apparently referring to Local 542's 1962–1963 contract with Construction) (J.A. 6a; 31a). On the following day, March 12, Local 542 (which had never been certified as the representative of Brothers' or Construction's employees) commenced picketing in front of the offices of Brothers and Construction, with signs reading "Kaminski Brothers and Kaminski Construction Unfair to Local 542, Operating Engineers" (J.A. 6a;

[2] Subsequently, additional new employees were hired (*ibid.*).

32a–34a). John Kaminski called his attorney and a meeting was held with Priscopo, during which picketing was suspended and Priscopo repeated Local 542's demand for a contract. Kaminski rejected the demand and picketing was immediately resumed (J.A. 6a; 34a–35a). On March 25, the picketing was extended to a very lightly traveled secondary road near Brothers' highway job site (J.A. 6a, 10a; 36a, 70a, 71a, 72a). On April 15, the picket signs were changed to read (J.A. 6a; 36a–37a):

> Kaminski Refuses to Renew Contract with Operating Engineers and Has Signed Contract with District 50 to Break Engineers' Picket Line. District 50 is Taking Jobs From Operating Engineers and Working with Employer Against Trade Union Movement.

On one occasion, a picket called to a Brothers' employee who was working on the job site to quit his work (J.A. 10a; 74a–75a).

The picketing continued for two months without a petition for a representation election having been filed. On May 8, in a proceeding under Section 10(l) of the Act, a federal district court enjoined the picketing, pending the Board's determination of the unfair labor practice charges filed against petitioner by District 50 (J.A. 1a, 7a, 11a). *Samoff* v. *Local 542, International Union of Operating Engineers*, 238 F. Supp. 376 (M.D. Pa.), affirmed, 341 F. 2d 589 (C.A. 3).

B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

Upon the foregoing facts, the Board found that Local 542 had picketed with an object of requiring Kaminski Brothers to contract, and therefore to recognize or bargain, with it as the representative of Brothers' employees. Petitioner contended that the picketing could not have had a recognitional purpose because, under the 1962 contract with Construction, Local 542 was already the recognized representative of Kaminski's employees. The Board rejected the factual premises of this contention. It held (a) that the 1962 contract had terminated several months prior to the picketing, and (b) that the contract, even if it had not terminated, constituted recognition of Local 542 by Construction but not by Brothers (J.A. 8a–9a). Finally, the Board held that Local 542's picketing was not protected by the publicity proviso to Section 8(b)(7)(C), since the picketing was not for the purpose of truthfully advising the public that Brothers did not have a contract with Local 542, but rather for the purpose of inducing the employees of Brothers and its suppliers to stop work (J.A. 10a–11a). Accordingly since Local 542 was not certified as the representative of Brothers' employees and had picketed for more than 30 days without an election petition having been filed, the Board concluded that Local 542 had violated Section 8(b)(7)(C) of the Act, and ordered it to cease and desist from that unfair labor practice (J.A. 11a–14a).

The court of appeals sustained the Board's findings, and enforced its order (Pet. 27).

ARGUMENT

Section 8(b)(7)(C) of the Act makes it an unfair labor practice for a union which has not been certified by the Board to picket an employer for more than 30 days with "an object" of requiring him "to recognize or bargain with" it "as the representative of his employees," unless within such time a petition for a representation election is filed with the Board. Under a proviso to Section 8(b)(7)(C), picketing for the purpose of "truthfully advising the public" that an employer "does not employ members of, or have a contract with" a union is excepted from the general prohibition. It is undisputed here that Local 542 was not certified and picketed Kaminski Brothers for more than 30 days without an election petition having been filed. Thus, the only questions presented relate to the propriety of the Board's findings, sustained by the court of appeals, that Local 542's picketing had a recognitional object and did not fall within the publicity proviso. These issues, which turn on the particular facts of this case, do not warrant review by this Court. In any event, as we now show, the record here amply supports the Board's findings.

1. Local 542 began picketing the day after Kaminski Brothers refused its demand to enter into a contract covering work on the new highway project; it suspended picketing only to reiterate its demand for a contract. Immediately upon Brothers' further rejection of that demand, picketing began again with signs referring to that rejection (see, *supra*, pp. 5–6). These efforts to "sign up" Kaminski Brothers war-

rant the Board's finding, sustained by the court of appeals, that Local 542 was picketing for a recognitional object, within the meaning of Section 8(b)(7) of the Act.[3]

There is no substance to petitioner's contention (Pet. 7–12) that its picketing was not recognitional because its representative status was already established. Although petitioner had had a contract and a bargaining relationship with Kaminski Construction, its picketing was aimed at obtaining recognition from Kaminski Brothers. Despite the common elements between the two companies, Brothers was a separate corporation, it had been engaged exclusively in strip mining (a different line of work than Construction had been doing), and it had an established bargaining relationship with a different union, District 1, United Mine Workers. Moreover, when Brothers extended its operations to highway building in 1964, it did so for economic reasons unrelated to Construction's relationship with petitioner and it utilized employees previously engaged in its own mining work, rather than employees of Construction. Finally, when petitioner commenced picketing in March 1964, it no longer had representative status even with Construction. As the Board found, its agreement with Construction had expired on December 31, 1963, and

[3] See, e.g., *Local 182, Teamsters*, 135 NLRB 851, 857, enforced, 314 F. 2d 53 (C.A. 2); *National Labor Relations Board* v. *Local 542, Operating Engineers*, 331 F. 2d 99 (C.A. 3), certiorari denied, 379 U.S. 889; *National Labor Relations Board* v. *Carpenters Local No. 2133*, 356 F. 2d 464 (C.A. 9); *Centralia Building & Construction Trades Council* v. *National Labor Relations Board*, 363 F. 2d 699 (C.A.D.C.).

Construction had been without employees and work since July 1963 (J.A. 4a, 9a). In these circumstances, the Board properly concluded that petitioner's prior status with Construction did not privilege its efforts to secure recognition from Kaminski Brothers.[4]

2. The Board was fully justified in finding that petitioner's picketing was not for the purpose of "truthfully advising the public" that Kaminski Brothers or Construction did "not employ members of, or have a contract with" petitioner. Not only was the picketing carried on at places of limited exposure to the public, but, from the outset until April 15, the picket signs stated merely that Brothers and Construction were "unfair" to petitioner. And, while the signs thereafter referred to Kaminski's refusal to contract with petitioner, they untruthfully stated that Kaminski had contracted with District 50 in an effort to "break [petitioner's] picket line" and untruthfully implied that Brothers had a prior contract with petitioner (J.A. 6a). Finally, on at least one occasion, a picket called to an employee to leave the job (J.A. 10a). In short, as the Board found (J.A. 10a–11a), petitioner's picketing was designed to notify not the

[4] There is no evidentiary basis for petitioner's assertions (Pet. 13–16) that the contract between Brothers and District 50 was the product of illegal employer assistance and a conspiracy in violation of the anti-trust laws. The General Counsel of the Board found petitioner's unfair labor practice charges in this respect to be without merit (R. 8a, n. 2). And there is no showing that District 50, in contracting with Brothers, was acting other than in its own interest. See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 664–666.

public, but "Kaminski's employees and * * * employees of other employers dealing with Kaminski of the existence of the dispute and to induce them to either leave their work or to avoid performing services on behalf of Kaminski."[5]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1966.

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[5] *National Labor Relations Board* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, relied upon by petitioner (Pet. 11, 19), is inapposite. The Court there held that Section 8(b)(4)(ii)(B) of the Act does not prohibit picketing at a secondary site for the purpose of inducing consumers not to purchase the product of the struck primary employer. The present case involves Section 8(b)(7)(C), and, as the Board found, the picketing appealed not to the public, but to employees.

U.S. GOVERNMENT PRINTING OFFICE: 1966